

TAX INCENTIVES — VALUABLE TOOLS FOR BIODIVERSITY CONSERVATION IN SOUTH AFRICA★

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*'Biodiversity is the diversity of life on earth, on which we depend for our survival. The variability of and within species and ecosystems helps provide some of our basic shelter, and medicine, as well as recreational, cultural, spiritual and aesthetic needs. Diverse ecosystems create the air we breathe, enrich the soil we till and purify the water we drink. Ecosystems regulate local and global climate. No one can seriously argue that biodiversity is not valuable. Nor can anyone seriously argue that biodiversity is not at risk.'*¹

1 INTRODUCTION

South Africa ranks as the third most biologically diverse² country in the world.³ This exceptionally rich diversity of fauna and flora is, however, one of the most threatened on the planet.⁴ The key sources of this threat are agricultural and forestry activities, the spread of alien invasive species, rapid urban expansion and genetic engineering.

Conserving biodiversity is increasingly recognized as an important prerequisite to achieving sustainable development.⁵ First, it contributes to

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¹ Dana Clark & David Downes 'What price biodiversity? Economics and biodiversity conservation in the United States' (1985) 11 *Journal of Environmental Law and Litigation* 9.

² 'Biological diversity', or 'biodiversity', is defined in both the National Environmental Management: Biodiversity Act 10 of 2004 and the Convention on Biological Diversity 31 *International Legal Materials* 818 as 'the variability among living organisms from all sources including terrestrial, marine, and other aquatic ecosystems and other ecological complexes of which they are a part and also includes diversity within species, between species, and of ecosystems'. It therefore consists of three main components, namely: 'genetic diversity' (the variation of genes within a species); 'species diversity' (the variety of species within a region); and 'ecosystem diversity' (the variety of ecosystems within a region). Biodiversity is not the individual genes, species or ecosystems themselves, but the diversity inherent within and between these genes, species and ecosystems.

³ World Conservation Monitoring Centre *Global Biodiversity Status of the Earth's Living Resources* (1992). Of the 18 000 plant species found in South Africa, for example, 80 per cent occur nowhere else in the world. See the White Paper on the Conservation and Use of South Africa's Biodiversity ('White Paper on Biodiversity') (in GN 1095 GG 18163 of 28 July 1997) 12.

⁴ Rachel Wynberg 'A decade of biodiversity conservation and use in South Africa: Tracking progress from Rio Earth Summit to the Johannesburg World Summit on Sustainable Development' (2002) 98 *South African Journal of Science* 235.

⁵ See generally David Farrier 'Conserving biodiversity on private land: Incentives for management and compensation for lost expectations?' (1995) 19 *Harvard Environmental LR* 303 at 305; Philippe Sands *Principles of International Environmental Law* 2 ed (2003) 499–501.

the maintenance of the earth's biospheric conditions that sustain human and other life.⁶ A failure to conserve biodiversity may undermine these conditions and lead to the extinction of many species, including humans. Secondly, it provides an actual and potential source of valuable biological resources, including water, food and the raw materials for pharmaceuticals, on which humans are dependent. Thirdly, humans are only one of many species inhabiting the earth and it is commonly argued that we have a moral duty to conserve the diversity of these other species.

Current regulatory measures, institutional structures, and resources have proven inadequate for the effective conservation of biodiversity. Many countries are therefore exploring alternative ways to conserve biodiversity, such as the creation of mechanisms enabling individuals, companies, communities and conservation organizations ('conservationists') to participate in this process voluntarily. Tax incentives are often provided to encourage conservationists to use these mechanisms.⁷

This article examines the extent to which the government has introduced, and could further introduce, effective conservation mechanisms and associated tax incentives to assist it in discharging its role as the trustee of South Africa's biodiversity.⁸ The analysis is highly relevant given the current legislative reform process spearheaded by the Department of Environmental Affairs and Tourism, which has led to the promulgation of the National Environmental Management: Biodiversity Act⁹ ('Biodiversity Act'), National Environmental Management: Protected Areas Act¹⁰ ('Protected Areas Act') and National Environmental Management: Protected Areas Amendment Act¹¹ ('Protected Areas Amendment Act').¹²

The article is divided into four parts. The first part examines key South African policy documents and international conventions that recognize the value of incentive mechanisms for biodiversity conservation. It is argued that the reform proposals recommended in the latter parts of the article do not constitute a departure from current government policy, but build on

⁶ 'Biospheric conditions' are those conditions that impact on the regions of the earth's crust and atmosphere that are occupied by living organisms.

⁷ It is acknowledged that there are many other forms of incentives, such as government subsidy schemes and grants, which could encourage conservationists to assist in biodiversity conservation. The ambit of this article is, however, limited to the consideration of tax incentives relating to income tax, estate duty, transfer duty and property rates.

⁸ The government is appointed as the trustee of South Africa's biodiversity in terms of s 3 of the National Environmental Management: Biodiversity Act *supra* note 2.

⁹ The Biodiversity Act *supra* note 2 (excluding ss 49, 57, 65, 66, 71, 105 and chap 6 and 7) commenced on 1 September 2004 (see GN 47 GG 26887 of 8 October 2004).

¹⁰ Act 57 of 2003. The Protected Areas Act commenced on 1 November 2004 (see GG 26960 of 2 November 2004).

¹¹ Act 31 of 2004, which will commence on a date to be proclaimed by the President in the Government Gazette (see GG 27274 of 11 February 2005).

¹² The contents of the Protected Areas Act and the Protected Areas Amendment Act were previously contained in one 'consolidated Bill'. Due to the fact that the consolidated Bill contained aspects of both concurrent national and provincial competence, and those of purely national competence, the consolidated Bill was divided into two Bills, namely that dealing with aspects of concurrent national and provincial competence (contained in the Protected Areas Act) and that dealing with aspects of exclusive national competence (contained in the Protected Areas Amendment Act).

what has already been identified as essential to ensure the effective conservation of South Africa's biodiversity.

The second part highlights four main ways in which conservationists can assist in biodiversity conservation, namely: assisting in extending protected areas; adopting sustainable land-use practices on private land; forming non-profit conservation organizations; and supporting current conservation initiatives. The third part considers various tax incentives that can be used to encourage conservationists to become pro-active participants in biodiversity conservation. Where applicable, brief reference is made to how various foreign jurisdictions have successfully implemented these conservation tools.

The fourth part considers South Africa's legislative framework contextually and analyses the extent to which it currently allows and encourages conservationists to undertake the four activities described in the second part of the article. It is argued that there are many legislative obstacles undermining the ability and desire of conservationists to do so and the article concludes with a discussion of how South Africa's conservation and tax laws can be crafted to overcome these hurdles.

2 CURRENT SOUTH AFRICAN POLICY FRAMEWORK

International environmental conventions and domestic policy documents make many references to the crucial role of incentive tools for biodiversity conservation.

South Africa is signatory to two conventions which explicitly refer to the value of using incentive measures to promote biodiversity conservation. These are the Convention on Biological Diversity¹³ and the Convention on Wetlands of International Importance Especially as Waterfowl Habitats.¹⁴ South Africa is bound by these conventions and must develop and implement domestic mechanisms to enable and encourage conservationists to assist in biodiversity conservation.¹⁵

¹³ Supra note 2. Ratified in November 1995. The Convention on Biological Diversity provides that South Africa must '...as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity' (art 11).

¹⁴ (1983) 22 *International Legal Materials* 698. Ratified in 1975. Also known as the 'Ramsar Convention', this recognizes the importance of '...assessing, revising, and developing incentive measures as tools for the conservation and wise use of wetlands, and the removal of perverse incentives that impede the delivery of such conservation and wise use...' (Resolution VIII.23, paras 3 and 4). Signatory countries agree to '...continue to review existing legislation and practices in order to identify and remove perverse incentives such as taxes and subsidies...' and '...to carry out participatory consultative processes to define clear and target-oriented incentive measures which address the underlying causes of wetland loss...' and to '...develop supportive legal and policy frameworks for the design and implementation of incentive measures' (Resolution VIII.23, paras 7 and 8).

¹⁵ Section 231 of the Constitution of the Republic of South Africa Act 108 of 1996 states that South Africa is bound by the provisions of any international agreement once it has been ratified by the National Assembly and the National Council of Provinces. These conventions have been so ratified and are therefore binding on South Africa.

The Department of Environmental Affairs and Tourism has therefore been considering the viability of using economic instruments as tools for environmental management for a number of years. First, the Environmental Resources Economics Discussion Document Three¹⁶ concludes that, although economic instruments are 'potentially powerful weapons in the defence of the environment', there are no environmental targets or standards to aim them at, and that these must be established before any economic instruments can be of much practical use. However, it confirms that 'the economic approach to environmental management is all about offering the private sector incentives, rewards and punishments'.¹⁷

Secondly, one of the six main goals of the White Paper on Biodiversity, which establishes the policy framework for biodiversity conservation in South Africa, is to 'create conditions and incentives that support the conservation and sustainable use of biodiversity'.¹⁸ The White Paper on Biodiversity recognizes that, although South Africa has many laws governing the use and conservation of natural resources, the 'command-and-control' approach¹⁹ adopted by these laws is inadequate to regulate biodiversity loss.²⁰ The government further acknowledges that it lacks the financial resources to invest in conserving biodiversity²¹ and that 'because people behave rationally by basing their decisions on an assessment of costs and benefits, the introduction of incentives by the Government is an important way in which people can be motivated to conserve and use biodiversity sustainably'.²² The White Paper on Biodiversity proposes a number of areas that need to be addressed:

- identifying and removing existing 'perverse incentives'²³ that encourage the loss of biodiversity and the unsustainable, inefficient and inequitable use of biological resources;

¹⁶ *Environmental Resource Economics Discussion Document Three — The Proposed Method for the Introduction of Economic Instruments as Tools of Environmental Management in South Africa* (1996). Study commissioned by the Department of Environmental Affairs and Tourism and undertaken by Deloitte & Touche Consortium of Consultants.

¹⁷ *Ibid* at 1.

¹⁸ *Op cit* note 3 chap 3(D).

¹⁹ In terms of this approach a government seeks to regulate human behaviour by prescribing a list of activities which people may or may not undertake. These activities are listed in laws. A failure to comply with these laws will lead to punishment in the form of a fine or imprisonment.

²⁰ *Op cit* note 3 chap 3, Goal 5.2 at 81. Problems associated with this approach include: its questionable success in achieving biodiversity conservation; the prohibitively high cost of compliance monitoring and enforcement; its failure to encourage altruistic conduct towards the environment; and its inequitable effect and the failure of national regulations to acknowledge regional differentiations. See generally R Stauth & P Baskind in Richard Fuggle & Marinus A Rabie (eds) *Environmental Concerns in South Africa* (1983) 39–40; Paul G Henderson 'Fiscal incentives for environmental protection — Introduction' (1994) 1 *South African Journal of Environmental Law and Policy* 49 at 51.

²¹ *Ibid* at 82.

²² *Ibid* at 81.

²³ Perverse incentives actively encourage the opposite of the desired outcome. Therefore, where the desired outcome is conserving and protecting biodiversity, an incentive that results in a depletion of biodiversity is a perverse incentive. A classic example in this regard is that of financial incentives granted to landowners in many countries to clear natural vegetation or fill in wetlands so that this land can be used for agriculture and forestry. The destruction of natural vegetation for agriculture and forestry is one of the greatest threats to biodiversity conservation, and therefore, by granting landowners an incentive to clear land, the government is effectively undermining its own conservation objectives.

- developing new financial and other incentives that support the conservation and sustainable use of biodiversity, and stimulate local stewardship of terrestrial, aquatic and marine and coastal areas;
- introducing incentives (such as tax relief) to strengthen the involvement of the private sector in the conservation of biodiversity; and
- developing measures that will enhance the capacity of existing conservation agencies, in both the private and public sectors, to receive, generate, invest and employ funds to promote their objectives, and to enter into contractual arrangements with private landowners.²⁴

These objectives are reflected in a number of other aspects of the White Paper on Biodiversity.²⁵ It is therefore surprising that, despite this clear recognition of the value of using conservation incentives, the Department of Environmental Affairs and Tourism has made very limited provision for these tools in South Africa's conservation legislation.

Finally, the Katz Commission of Inquiry, appointed by the National Treasury to consider various aspects of the South African tax structure, concluded that 'it is plainly unrealistic to think in terms of a tax system devoid of incentives'.²⁶ The Commission indicated that tax incentives should only be allowed if: the intended objective of offering a tax incentive is a legitimate and necessary purpose of the government; this objective can be achieved more effectively through tax incentives than through government expenditure programmes; the loss of revenue relating to the incentive measures can be justified in relation to the benefits attained; and the scope for abuse of the tax incentive measure is not excessive.²⁷ It is suggested that the tax incentive options set out in the latter part of this article would satisfy all four of these requirements.

3 HOW CAN CONSERVATIONISTS ASSIST IN BIODIVERSITY CONSERVATION?

The South African government appears, in principle, to have accepted that the use of incentives is essential to ensure the long-term conservation of South Africa's biodiversity. The key debate is around how this principle may be implemented. Three primary issues need to be addressed, namely: the identification of priority conservation activities; the creation of

²⁴ Ibid at 82–3.

²⁵ Policy objective 1.2 provides that government will 'introduce legal measures and incentives to conserve important ecosystems, habitats, and landscapes outside of protected areas. . .' (Op cit note 3, chap 2, Goal 1.2 at 27). Policy objective 1.6 provides that the government will provide incentives to landowners to control and eradicate alien organisms identified as threatening biodiversity (chap 2, Goal 1.6 at 38). In addition, chap 4, which sets out the approach for implementing the policy, specifically refers to introducing financial incentives and disincentives; using taxes, levies and charges linked to activities directly using and/or affecting biodiversity; and introducing incentives to strengthen the involvement of the private sector in the conservation and sustainable use of biodiversity (chap 4.5.3 at 97–8).

²⁶ M M Katz, D M Davis, J De V Graaff, P Le R Du Toit, P Mohr, D D Mokgatle & J N Njeke *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* (1994) 88.

²⁷ Ibid.

mechanisms activities to enable conservationists to undertake these activities; and the provision of tax incentives to encourage conservationists to use these mechanisms where the associated expenses may discourage them from doing so.²⁸

There are many activities which conservationists could undertake to assist in biodiversity conservation. The ambit of this article is, however, limited to the following four key activities: assisting in extending the current area of land incorporated within protected areas; adopting sustainable land-use practices on private land; forming non-profit environmental organizations; and supporting current conservation initiatives through donations of land or money.

3.1 *Assisting in the extension of protected areas*

One of the traditional approaches to biodiversity conservation is to set aside areas of land in protected areas to which access is limited and within which certain human activities are strictly regulated. Although these 'area regimes' remain an important mechanism for ensuring biodiversity conservation, there are a number of problems associated with this approach.

First, protected areas are generally declared in respect of state-owned land. A significant portion of high-value conservation land is, however, privately owned and therefore falls outside the ambit of these area regimes. Secondly, governments frequently lack the resources to purchase private land for inclusion in protected areas, and even if they were able to do so, they often lack the necessary resources and capacity to manage these areas. Thirdly, governments frequently lack the capacity and resources to enforce applicable conservation legislation within and outside these protected areas. This management approach often excludes the opportunity of sharing the costs and benefits of conservation management with conservationists.

Many countries have therefore created mechanisms to incorporate private land in protected areas without actually purchasing it. These countries have generally used two legal mechanisms to achieve this end, namely conservation servitudes²⁹ and conservation agreements.

3.1.1 *Conservation servitudes*

Certain countries encourage private landowners, whose land has been identified as being of high conservation value, to enter into an agreement with an accredited conservation organization, in terms of which the landowner retains ownership of the property, but undertakes to manage the land in the manner laid out in the agreement. The agreement may limit unsustainable activities and place additional responsibilities on the landowner to ensure the ongoing conservation of biodiversity located on the

²⁸ These may be in the form of expenses incurred in clearing alien invasive vegetation, making donations to conservation agencies, or allowing decreases in commercial property values as a result of entering into agreements that effectively limit a private landowner's property rights.

²⁹ See generally Peter M Morrisette 'Conservation easements and the public good: Preserving the environment on private lands' (2001) 41 *Natural Resources Journal* 373.

property, or the portion subject to the agreement. The agreement takes the form of a deed of servitude which is generally registered against the title deeds of the property and is binding on successive owners. The private land over which the servitude has been registered may subsequently be incorporated into a formally proclaimed protected area. Landowners are commonly granted a range of tax incentives to enter into agreements to create conservation servitudes, and therefore compliance monitoring is regarded as essential. Many countries have enacted legislation specifically to provide for conservation servitudes, including Kenya,³⁰ over forty states in the United States of America,³¹ Switzerland, Germany, Costa Rica, and a growing number of provinces in Canada.³²

Although conservation servitudes have proven highly effective conservation mechanisms in various jurisdictions, the South African common-law constraints regarding praedial servitudes³³ and personal servitudes³⁴ undermine their use in this country. Since public servitudes³⁵ are regarded as distinct from personal and praedial servitudes and do not therefore suffer from the above constraints, it may be argued that they provide a potential avenue through which conservation servitudes could be introduced into South African law. However, international experience indicates that conservation servitudes require strict regulation with regard to content, form, the identification of accredited agencies with whom agreements for their creation could be entered into, and the type of land in respect of

³⁰ Nyokabi Gitahi 'Easements & wildlife conservation in Kenya' Unpublished paper presented at the Second Colloquium of the World Conservation Union Academy of Environmental Law, held in Nairobi from 4–8 October 2004.

³¹ Daniel C Stockford 'Property tax assessment of conservation easements' (1990) 17 *Boston College Environmental Affairs* LR 824. Morrisette op cit note 29 at 374.

³² Ian Bowles, David Downes, Dana Clark & Marianne Guerin-Mcmanus 'Economic incentives and legal tools for private sector conservation' (1998) 8 *Duke Environmental Law and Policy Forum* 209 at 212–17.

³³ One of the essential requirements for registering a praedial servitude is that there must be both a dominant and servient tenement. A conservation servitude would generally impose a burden on a specific landowner in relation to his or her land, and not a burden on one property in favour of another. Therefore, this requirement would not be satisfied. See generally C G van der Merwe & M J de Waal 'Servitudes' *LAWSA* first re-issue vol 24 para 392–3.

³⁴ Although not requiring the existence of two adjacent properties, personal servitudes are inextricably bound to the person in whose favour it has been granted and not to the property over which it has been registered. The servitude cannot be sold or transferred to another person, is not perpetual and exists only for the lifetime of the person in whose favour it has been granted. Where the person in whose favour it has been granted is a juristic person, it will stay in effect for one hundred years (*South African Railways and Harbours v Paarl Roller Flour Mills Ltd* 1921 CPD 62). The limited duration of personal servitudes significantly undermine their potential use as a long-term conservation mechanism in South Africa. In addition, they may prejudice any person who, within the duration of the servitude, has invested significant effort and resources in conserving and/or rehabilitating the area of land subject to the servitude. See generally C G Hall & E A Kellaway *Servitudes* 3 ed (1973).

³⁵ A public servitude may be granted in favour of the public, or a certain portion of it, with respect to both state and private land. It need not be granted in favour of a particular person but in favour of the public, or a portion of it. It need not be granted over one property (servient tenement) in favour of an adjacent contiguous property (dominant tenement), but over the original property itself. Public servitudes can be created by means of a notarial deed executed by the owner of the land, setting out the terms and conditions of the servitude. The notarial deed is then registered against the title deeds of the property concerned and is binding on successive owners. Such servitudes can also be created by way of legislation, in which case special provision is sometimes made for the termination of the servitude by an appropriate authority. Typical examples of public servitudes include the right to collect firewood or the right to use trek-paths. See generally Van der Merwe & De Waal op cit note 33 para 465–8.

which they can apply. Were the government to seek to introduce the concept of conservation servitudes into South African law, it would appear preferable to do so by way of legislation rather than creative extensions of the common law.

3.1.2 *Conservation agreements*

Other countries encourage private landowners to enter into legal agreements with accredited conservation organizations to manage their land in a sustainable manner. A landowner, for example, may enter into an agreement with a conservation authority not to plough up portions of his or her property for agriculture, where these areas are of high conservation value. The legal effect of a conservation agreement is very similar to that of a personal servitude under South African law, as the conservation agreement is of limited duration and does not bind successive owners. The landowner is generally entitled to some form of tax incentive, such as being entitled to deduct costs associated with implementing the agreement for income tax purposes. Conservation agreements of this nature are currently used in the United Kingdom, Australia, Switzerland, Liechtenstein, the Netherlands and the United States of America.³⁶

It is suggested that, in order for conservation agreements to be effective, the following procedures need to be prescribed in legislation. First, sites of high conservation value, as well as conservation organizations which are eligible to enter into conservation agreements with private landowners, need to be identified. Secondly, criteria by which to identify these areas and conservation organizations must be prescribed. Thirdly, the minimum terms, conditions and procedures for entering into conservation agreements need to be determined. Fourthly, in order to ensure ongoing compliance, provision must be made for some form of annual reporting or auditing of the land over which agreements have been registered. Finally, tax incentives need to be offered to these landowners as they effectively forgo significant property rights when entering into these agreements.

3.2 *Encouraging sustainable land-use practices on private land*

Given that the greater part of land in the world is held in private ownership and, accordingly, also the elements of biodiversity, countries have increasingly created mechanisms to encourage private landowners to adopt sustainable land-use practices, including clearing alien invasive vegetation, preventing soil erosion, and rehabilitating degraded environments.³⁷ However, many private landowners lack the resources to undertake these measures and should be offered incentives to enable and encourage them to

³⁶ Bowles et al op cit note 32 at 217–20.

³⁷ In the United States, farmers may deduct the costs of soil and water conservation measures from their taxable income. In Italy, conservation organizations can deduct any costs they incur in managing a protected area from their taxable income. (Ibid at 220–1).

do so. Mechanisms must similarly be prescribed to identify which landowners and activities should qualify for any applicable incentives.

3.3 Facilitating formation of non-profit conservation organizations

Conservation organizations can provide invaluable assistance to governments and private landowners by undertaking, funding and supporting a broad range of conservation-related activities, including conserving and rehabilitating degraded areas, managing protected areas, undertaking research, acting as environmental watchdogs, and providing environmental education.

Governments should, therefore, create the necessary legal mechanisms to enable conservationists to form organizations for the purpose of undertaking conservation-related activities. These organizations generally operate on a non-profit basis and are reliant on local and foreign donations. Due to ever-increasing operational costs, internal policy obstacles and a significant reduction in the availability of foreign donor funding, they frequently lack the necessary resources to fund their activities. Therefore, governments must prescribe the necessary incentive measures to enable these organizations to secure essential funding. These measures could include granting tax exemptions and deductions on income received and donated respectively. The necessary safeguards must, however, be established to minimize the potential for these organizations to be used as tax avoidance vehicles. These safeguards could include setting strict eligibility criteria regarding the nature of the activities which can be undertaken by the organization in order to qualify for non-profit status; imposing stringent registration conditions; and prescribing regular reporting and auditing requirements.

3.4 Supporting current conservation initiatives

Given the funding crisis frequently experienced by many conservation organizations, conservationists should be encouraged to donate land or money to them for inclusion in protected areas or to fund their conservation activities. Governments need to grant appropriate incentives to potential donors to encourage donations of this nature.

4 TAX INCENTIVES TO ENCOURAGE PRIVATE CONSERVATION ACTIVITIES

What is the rationale behind offering incentives to conservationists to undertake the above conservation activities? One of the realities of the private market economy is that it does not generally supply all goods and services needed by society ('public goods').³⁸ However, because these public goods are required by — and benefit — society at large, and not just

³⁸ Paul Wonnacott *Economics* (1982) 83.

the interests of certain individuals or sectors of society,³⁹ governments often regulate certain aspects of the private sector in order to facilitate their provision.

Biodiversity conservation is increasingly regarded as a public good — a trend which is associated with a global shift in the approach to conservation, namely that it is as an integral element of sustainable development rather than a purely elitist concern.⁴⁰ The South African government has partially acknowledged this, as our tax legislation provides that ‘engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere’ is a public benefit activity.⁴¹

Governments are ordinarily responsible for supplying these public goods, but frequently lack the necessary resources to do so. This is very relevant in South Africa where public goods such as health care, housing and education are prioritized over biodiversity conservation with regard to the allocation of state funds.⁴² According to the South African government’s 2004/2005 budget, 0.08 per cent⁴³ of the country’s total expenditure⁴⁴ is directly allocated to preserving biodiversity and to conservation.⁴⁵ Encouraging the private sector to assist voluntarily in funding and implementing biodiversity conservation therefore appears essential. Given that conservationists can effectively provide a public good that would ordinarily be funded and undertaken by government, they should be offered incentives for doing so. This conclusion is supported by research undertaken in the USA,⁴⁶ Australia⁴⁷ and South Africa.⁴⁸

This approach provides various potential benefits for governments. First, they can share the costs of biodiversity conservation with their population. By offering private landowners incentives to either contract or donate their land of high conservation value to protected areas, governments are released from having to purchase it. In addition, governmental conservation expenditure associated with implementation and enforcement can be

³⁹ Typical examples of these public goods include the provision of education, health, social security, defence, and the maintenance of public roads as well as the general infrastructure of the country.

⁴⁰ Staath et al op cit note 20 at 26–7. See also Wynberg op cit note 4 at 233–4.

⁴¹ Section 30 read with Schedule 9 (Part 1) of the Income Tax Act 34 of 1953.

⁴² David Schmidtz & Elizabeth Willott ‘2003 Symposium: Environmental ethics and policy: Bringing philosophy down to earth: reinventing the commons: An African case study’ (2003) 37 *University of California Davis LR* 224. See also Jane Turpie & W Roy Siegfried ‘The conservation-economic imperative: securing the future of protected areas in South Africa’ (1996) 4 *Africa Environment & Wildlife* 36.

⁴³ R 276 816 million.

⁴⁴ R 336 billion.

⁴⁵ Unpublished presentation to the Portfolio Committee on Environmental Affairs and Tourism, Department of Environmental Affairs and Tourism (2004).

⁴⁶ James W Boyd, Kathryn Coballero and R David Simpon *The Law and Economics of Habitat Conservation: ‘Resources for the Future’* (1999) 39.

⁴⁷ M D Young, N Gunningham, J Elix, J Lambert, B Howard, P Grabosky & E Macrone ‘Reimbursing the future: An evaluation of motivational, voluntary, price-based, property-right, and regulatory incentives for the conservation of biodiversity’ *Biodiversity Series Paper No. 9*, Biodiversity Unit, Department of Environment and Heritage, Australia (1996).

⁴⁸ Jan Glazewski *Conservation of Private Land by Means of Compensatory Mechanisms and Incentives* unpublished MA dissertation: Department of Environmental and Geographical Sciences, University of Cape Town (1986).

significantly reduced through the granting of tax incentives to private landowners who voluntarily undertake conservation activities.

Secondly, conservation of the natural environment is central to rural development. By sharing the burden of conservation with conservationists, rural economies can be supported and employment levels can be sustained. In areas where agriculture is not commercially viable, conservation creates an opportunity for local populations to generate an alternative source of revenue through the establishment of formally protected areas and associated eco-tourism activities.⁴⁹ Commercial activities linked to the establishment of these protected areas may in turn, if properly taxed, contribute to local authority revenues.

The use of tax incentives to achieve conservation goals is commended by some and derided by others, who argue that tax incentives may significantly impact on tax revenue essential to fund other crucial public goods. These debates are complex, plagued with uncertainties as to how environmental resources should be valued, and fall outside the ambit of this article.⁵⁰ I argue that the availability of the incentive measures proposed in the latter part of this article should be targeted to key conservation areas, activities and organizations. This would minimize the potential loss in tax revenue and ensure that the benefits these incentives bring to biodiversity conservation outweigh limited revenue losses.

In light of the anticipated advantages of creating a positive tax climate for conservation, what incentives could be offered to conservationists to encourage them to undertake the conservation activities identified above?

4.1 *Tax deductions for donations*

Governments could allow donors to deduct the sum of any donation, or a percentage of it, for the purposes of calculating their taxable income.⁵¹ This could apply in respect of donations of cash, land or a conservation servitude to a qualified conservation organization and could be limited to certain thresholds. In Germany, for example, taxpayers can deduct the value of a cash donation to accredited charitable environmental organizations from their taxable income.⁵² In the United States of America, the federal

⁴⁹ The establishment of these protected areas potentially provides local communities with employment and eco-tourism opportunities, creating new careers and enhancing local skills. In addition, international funding may be directed into local economies as a result of international recognition of the conservation status of a particular area and of the need to alleviate rural poverty so as to minimize the environmental impact that these communities have on the area.

⁵⁰ For a discussion on the role of economics in developing environmental policy see generally Barton H Thompson, Jr. 'What good is economics?' (2003) 37 *University of California Davis LR* 175; Jane Turpie 'The role of resource economics in the control of invasive alien plants in South Africa' (2004) 100 *South African Journal of Science* 87; Stauth et al op cit note 20.

⁵¹ Income tax is generally levied on any income (whether in the form of a salary, rental or interest earned on an investment) earned by a taxpayer during the financial year. Certain income is exempt from tax. Taxpayers are also generally allowed to deduct from their taxable income any money spent in order to generate income.

⁵² Friedrich Von Zezschwitz 'Environmental taxes in Germany' in Sanford E Gaines & Richard A Westin (eds) *Taxation for Environmental Protection: A Multinational Legal Study* (1991) 91.

government permits an income tax deduction for donations of property or interests in property, such as a conservation servitude, to a broad range of charitable organizations.⁵³ Similar deductions are allowed in other jurisdictions such as Costa Rica and Australia.⁵⁴

4.2 *Tax deductions for certain land uses*

Alternatively, governments could grant landowners tax deductions in respect of expenditure incurred in undertaking certain identified conservation activities. In the USA and Italy,⁵⁵ for example, farmers can deduct the costs of certain soil and water conservation measures from their taxable income. Deductions of this nature could be extended to allow landowners to deduct costs incurred in implementing the terms and conditions of a conservation servitude or conservation agreement from their taxable income. The total annual allowable deduction could be limited to a fixed amount or a prescribed percentage of the landowners' taxable income.

4.3 *Tax exemptions and reductions*

Governments could also grant tax exemption or reductions to certain persons or conservation organizations in respect of various taxes such as property taxes,⁵⁶ transfer duty,⁵⁷ and estate duty.⁵⁸

First, the valuation of property and the levying of tax on it have a significant effect on land use. If used creatively, property tax can significantly improve conservation and sustainable land-use practices in two principal ways: private landowners could be granted tax reductions for undertaking certain identified conservation activities on their land, such as alien vegetation clearing, while, in addition, certain land could be exempted from property tax, such as land over which a conservation servitude or agreement is registered or land which is incorporated into a protected area. This type of incentive has been implemented in Brazil, Guatemala, the United States, and Canada.⁵⁹ The inconsistent imposition of property taxes may, however, discourage sustainable land-use practices since landowners, predominantly in rural areas, may be required to cultivate previously undeveloped land of high conservation value to generate income to pay their property taxes. Measures should be put in place to ensure that this does not occur.

⁵³ Julia LeMense Huff 'Protecting ecosystems using conservation tax incentives: How much bang do we get for our buck?' (2004) 11 *Missouri Environmental Law and Policy Review* 138 at 140.

⁵⁴ See generally Bowles et al op cit note 32.

⁵⁵ Ibid at 222.

⁵⁶ Property tax (commonly known as property rates in South Africa) is levied on land in order to fund and maintain local services and infrastructure. It is usually calculated according to the market value of the land.

⁵⁷ Transfer duty is levied on any transfer of immovable property. It is calculated according to the value for which the property was sold and is due and payable by the person purchasing the property on registration of its transfer to the new owner.

⁵⁸ Estate duty is levied on the estate of any deceased person. It is calculated according to the value of the deceased's estate and is due and payable once the executor has finalized the estate.

⁵⁹ Stockford op cit note 31 at 833. Huff op cit note 53 at 142. Bowles et al op cit note 32 at 223–5.

Secondly, governments could allow a reduction in, or an exemption from, transfer duty in respect of land that is transferred to certain prescribed conservation organizations for inclusion in a protected area. This may enable these organizations to purchase land of high conservation value, which they would not ordinarily be able to do because of costly transfer duties.

Finally, tax exemptions or reductions could be granted in respect of estate duty. Estate duty is generally based on the fair market value of property in the estate. In many cases, the tax burden imposed by taxing land at the fair market value forces heirs to sell the land to pay estate duty, particularly if the deceased was rich in assets (including land) but poor in cash. This is partly because the fair market value is often defined as the value of the land converted to the highest and best use.⁶⁰ In order to avert this scenario, governments could exempt any land which is left to an approved conservation organization from estate duty. In addition, governments could also allow a reduction in estate duty in respect of land contracted by the deceased or heirs into a protected area or over which a conservation servitude or agreement is registered.⁶¹ Many countries, including the United Kingdom and the United States of America, are modifying their estate-duty regimes to discourage the subdivision of land identified as being of high conservation value.⁶²

The key rationale behind granting many of the above tax exemptions or reductions is that these conservation servitudes or agreements generally limit a landowner's property rights and therefore often reduce the market value of the property.⁶³

5 THE CURRENT SOUTH AFRICAN LEGISLATIVE FRAMEWORK REGULATING BIODIVERSITY CONSERVATION

South Africa has a complex and largely un-coordinated network of national and provincial laws that regulate the conservation and use of South Africa's biodiversity.⁶⁴ The Biodiversity Act and the Protected Areas Act will

⁶⁰ In other words, the most intensive development that does not necessarily favour the public good.

⁶¹ Deductions of this latter nature are provided for in the United States federal tax legislation. See Huff op cit note at 141 and Morrisette op cit note 29 at 393.

⁶² Bowles et al op cit note 32 at 225–6.

⁶³ Stockford op cit note 31 at 830.

⁶⁴ These include the National Environmental Management Act 107 of 1998, World Heritage Convention Act 49 of 1999, National Heritage Resources Act 25 of 1999, National Forests Act 84 of 1998, Animal Improvement Act 62 of 1998, National Water Act 36 of 1998, Marine Living Resources Act 18 of 1998, Genetically Modified Organisms Act 15 of 1997, Environment Conservation Act 73 of 1989, Forest Act 122 of 1984, Conservation of Agricultural Resources Act 43 of 1983, National Parks Act 57 of 1976, Plant Improvement Act 53 of 1976, Plant Breeders' Rights Act 15 of 1976, Mountain Catchment Areas Act 63 of 1970 and various provincial nature conservation and land-use planning ordinances and acts.

significantly reform the manner in which biodiversity is conserved in South Africa.⁶⁵

Current conservation laws generally adopt traditional legal approaches to conserving biodiversity. Certain laws prescribe a network of national and provincial protected areas to which access is limited and in which activities that may impact on biodiversity are strictly regulated.⁶⁶ Others list various species of fauna or flora in respect of which activities are strictly regulated.⁶⁷ A licence is generally required prior to undertaking any activity that may impact upon a listed species. Finally, various laws identify activities generally, or in respect of certain specific areas, that may impact on the conservation of South Africa's biodiversity.⁶⁸ Any person wishing to undertake these listed activities will generally be required to obtain authorization prior to doing so, and may be required to undertake an environmental impact assessment before the authorization can be granted. The majority of these laws employ the command-and-control approach.

South Africa also has many laws that regulate the manner in which the government levies taxes. These include the Income Tax Act,⁶⁹ the Transfer Duty Act,⁷⁰ the Estate Duty Act⁷¹ and the Local Government: Municipal Property Rates Act⁷² ('Property Rates Act'). (The last-mentioned act will significantly reform the manner in which property tax is levied in South Africa.)⁷³

It is noteworthy that current conservation and tax legislation make very limited provision for conservation mechanisms and associated tax incentives, despite the clear recognition by the government that it is essential to do so in order to conserve South Africa's biodiversity. The remainder of this article provides an analysis of the above laws and proposes how the government could mould these laws to enable and encourage conservationists to assist in biodiversity conservation.

5.1 *Assisting in the extension of protected areas*

The government owns approximately 16 per cent of the land in South Africa. The remaining 84 per cent of land, a significant portion of which is of high conservation value, is privately owned. The government's efforts to

⁶⁵ Most of the Biodiversity Act 10 of 2004 commenced on 1 September 2004, and the Protected Areas Act commenced on 1 November 2004. See *supra* notes 9 and 10.

⁶⁶ Examples include: National Parks Act 57 of 1976; Environment Conservation Act 73 of 1989 (Part III); National Forests Act 84 of 1998 (chap 3, Part 2); Marine Living Resources Act 18 of 1998 (Chap 4) and the Mountain Catchment Areas Act 63 of 1970.

⁶⁷ Examples include: National Forests Act 84 of 1988 (Chap 3, Part 3); Western Cape Nature Conservation Laws Amendment Act 3 of 2000.

⁶⁸ Examples include: Environment Conservation Act 73 of 1989 (Part V); National Environmental Management Act 107 of 1998 (Chap 5); National Forests Act 84 of 1998 (Chap 3, Part 1) and the Genetically Modified Organisms Act 15 of 1997.

⁶⁹ Act 34 of 1953.

⁷⁰ Act 40 of 1949.

⁷¹ Act 45 of 1955.

⁷² Act 6 of 2004.

⁷³ The Property Rates Act will only commence once the President has issued a proclamation to this effect in the *Government Gazette* (s 96).

conserve biodiversity through the proclamation of protected areas have focused predominantly on state-owned land.

Less than six per cent of the land in South Africa is currently so conserved.⁷⁴ The Minister of Environmental Affairs and Tourism has announced the government's intention to increase this percentage to eight per cent by the end of 2004,⁷⁵ an unattainable goal given the unavailability of additional suitable state land or the financial resources to purchase suitable private land. The government must therefore create alternative mechanisms to incorporate private land of high conservation value in protected areas.⁷⁶

5.1.1 *Conservation mechanisms*

South Africa has a range of laws that provide for the establishment of over 20 types of protected areas.⁷⁷ Of these, certain laws authorize the relevant authorities to declare land as a protected area irrespective of whether the consent of the private landowner has been obtained.⁷⁸ Other laws require the relevant authorities to enter into agreements with private landowners where they wish to incorporate private land,⁷⁹ while others merely require the consent of the private landowner to do so.⁸⁰ Finally, various provincial conservation ordinances allow private landowners to initiate the process by approaching the relevant authority to request that their land be so declared.⁸¹

Private landowners therefore have a range of mechanisms to voluntarily incorporate their land into a protected area, and approximately 16 million hectares are so conserved.⁸²

The Protected Areas Act significantly reforms the regime regarding such areas in South Africa. It repeals the provisions in the Environment Conservation Act⁸³ that regulate certain types of protected area,⁸⁴ while the Protected Areas Amendment Act will repeal the National Parks Act. The

⁷⁴ Press release issued by Ministry of Environmental Affairs and Tourism on 9 October 2003.

⁷⁵ Ibid.

⁷⁶ Tim Crowe 'Developing a national strategy for the protection and sustainable use of South Africa's biodiversity' (1996) 92 *South African Journal of Science* (1996) 35.

⁷⁷ These laws include the National Parks Act, Environment Conservation Act, National Forest Act, World Heritage Convention Act, Marine Living Resources Act, Mountain Catchment Areas Act all supra note 64, Sea Birds and Seals Protection Act 46 of 1973, Lake Areas Development Act 39 of 1975 and various provincial conservation ordinances and acts.

⁷⁸ These include protected natural environments declared under the Environment Conservation Act (s 16(1)(b)) and mountain catchment areas declared under the Mountain Catchment Areas Act (s 2).

⁷⁹ These include the National Parks declared under the National Parks Act (s 2B(1)(b)) and special nature reserves declared under the Environment Conservation Act (s 18(2)(bA)).

⁸⁰ These include the forest nature reserves and wilderness areas declared under the National Forests Act (s 8(1)(c)); and world heritage sites declared under the World Heritage Convention Act (s 7).

⁸¹ In terms of the Western Cape Nature Conservation Laws Amendment Act supra note 67 private landowners can approach the relevant provincial minister and request that he/she declare their land, or a portion of it, as a private nature reserve (s 12).

⁸² Mark Botha's submission to the Portfolio Committee on Local Government Municipal Systems Bill and Related Legislation' Botanical Society of South Africa, Cape Town, quoted in Wynberg op cit note 4 at 238.

⁸³ Sections 16–18 that deal with special nature reserves and protected natural environments.

⁸⁴ Section 90.

Protected Areas Act appoints the government as the trustee of South Africa's protected areas,⁸⁵ preserves the validity of various current forms of protected area⁸⁶ and provides for the declaration of four additional types of protected area, namely special nature reserves,⁸⁷ national parks,⁸⁸ nature reserves,⁸⁹ and protected environments.⁹⁰ The Minister of Environmental Affairs and Tourism and relevant provincial MECs can generally declare private land as one of the above four types of protected area only if the owner has consented to the declaration by way of written agreement.⁹¹ The declaration process may be initiated by the Minister, an MEC or the owners of the land acting individually or collectively.⁹² The Protected Areas Act provides for the registration of the abovementioned agreements against the title deeds of the private property concerned, hence their terms will bind successive owners.⁹³

The Protected Areas Act therefore provides ample mechanisms enabling conservationists voluntarily to contract their land into protected areas, thereby relieving the government of the burden to lease or purchase this land outright. In addition, the fact that these agreements will be binding on subsequent owners should facilitate the long-term conservation of these areas. Finally, the prescription of qualification criteria to determine whether land is suitable for declaration should ensure that only land of high conservation value will be so declared. However, are there sufficient tax incentives to encourage conservationists to utilize these mechanisms?

⁸⁵ Section 3.

⁸⁶ These include: provincial protected areas declared in terms of the provincial conservation ordinances and acts (s 12); world heritage sites declared and regulated under the World Heritage Convention Act supra note 64 (s 13); marine protected areas declared and regulated under the Marine Living Resources Act supra note 64 (s 14); forest nature reserves and forest wilderness areas declared and regulated under the National Forests Act supra note 64 (s 15); and mountain catchment areas declared and regulated under the Mountain Catchment Areas Act supra note 64 (s 16).

⁸⁷ These are declared by the Minister of Environmental Affairs and Tourism to protect highly sensitive areas, outstanding ecosystems, species, geological or physical features, or to make the area available primarily for scientific research (s 18(2)).

⁸⁸ These are declared by the Minister of Environmental Affairs and Tourism to protect an area of national or international biodiversity importance; to prevent exploitation or occupation inconsistent with the protection of the ecological integrity of the area; to provide spiritual, scientific, educational, recreational and tourism opportunities which are environmentally compatible; and, where feasible, to contribute to economic development (s 20(2)).

⁸⁹ These are declared by the Minister of Environmental Affairs and Tourism and/or the provincial Member of the Executive Committee (MEC) responsible for environmental affairs for a number of purposes, including the following: to supplement the system of national parks in South Africa; to protect areas which have significant natural features or biodiversity or are of scientific, cultural, historical or archaeological interest; to protect areas which are in need of long-term protection; and to provide for a sustainable flow of natural products and services to meet the needs of a local community (s 23(2)).

⁹⁰ These are declared by the Minister of Environmental Affairs and Tourism and/or the provincial MEC (responsible for environmental affairs) for a number of purposes, including the following: to regulate the area as a buffer zone for the protection of a special nature reserve, national park, world heritage site or nature reserve; to enable owners to take collective action to conserve biodiversity on their land and to seek legal recognition for this; to protect the area if it is sensitive to development; and to protect a specific ecosystem outside a special nature reserve, national park, world heritage site or nature reserve (s 28(2)).

⁹¹ See s 18(3) (special nature reserves), s 20(3) (national parks) and s 23(3) (nature reserves). Protected environments require the consent of, but not a formal written agreement with, the private landowner (s 28(3)).

⁹² Section 35.

⁹³ See ss 35(3) and 36.

5.1.2 *Tax incentives*

South African legislation does currently provide some incentives for conservationists to contract their land into protected areas. First, the National Parks Act prescribes that no rates or taxes of any kind may be levied on any land, state or private, or any building that is situated within a national park.⁹⁴ This exemption extends to land which is made available by a private landowner to a national park in terms of the arrangement discussed above, on condition that the land is not used by the landowner. This provides a significant incentive for individuals and communities to contract their land to national parks. The National Parks Act will, however, be repealed by the coming into force of the Protected Areas Amendment Act. The latter act does not preserve the above exemption. This may undermine the viability of many current national parks as the incentive for private landowners to contract their land into protected areas will be removed.

A similar exemption applies to land situated within a mountain catchment area declared in terms of the Mountain Catchment Areas Act.⁹⁵ This Act does not, however, make provision for individuals or communities voluntarily to contract their land into these mountain catchment areas. Therefore, this latter benefit does not act as an incentive to make one's land available voluntarily, but rather as a form of compensation for having been compelled to do so.

Prior to the Local Government: Municipal Structures Act ('Municipal Structures Act'),⁹⁶ rural and agricultural land, in which the majority of South Africa's protected areas is located, fell predominantly outside the property rates regime or was exempt from the ambit of property rates levied by municipalities.⁹⁷ The Local Government: Municipal Demarcation Act,⁹⁸ however, redefines the municipal boundaries to incorporate all parts of the country, whether rural, agricultural, urban or peri-urban. The municipalities are, therefore, in the process of reviewing their property rating systems in respect of property falling in their jurisdictions, including rural and agricultural land. The imposition of rates on land currently reserved for conservation purposes may significantly impact on the viability of these conservation undertakings and owners may be forced to develop this land in order to pay property taxes.

The Property Rates Act will regulate municipalities' power to impose rates on property. It prohibits municipalities from levying rates 'on those parts of a special nature reserve, national park or nature reserve within the meaning of the Protected Areas Act, or of a national botanical garden . . . which are not developed or used for commercial, business, agricultural or

⁹⁴ Supra note 64, s 18.

⁹⁵ Supra note 64, s 5.

⁹⁶ Act 117 of 1998.

⁹⁷ This was due to the fact that the municipal boundaries, and hence the area in respect of which they could levy rates, generally ended at the urban fringe.

⁹⁸ Act 27 of 1998.

residential purposes'.⁹⁹ This provision therefore extends the current incentive for landowners to contract their land into the above three types of protected area in order to avoid the imposition of rates on their property. In addition, it also creates a significant disincentive for landowners who have contracted their land into these forms of protected area subsequently to withdraw from these agreements. This is due to the fact that any landowners who seek to withdraw will be held retrospectively liable for any rates that would have been due had their land not been so exempted.¹⁰⁰

This provision has a number of limitations, however. First, it does not apply to *protected environments* declared under the Protected Areas Act. This will effectively make these areas one of the most highly taxed land-uses in South Africa despite the fact that they are regulated almost as stringently as other protected areas under the Protected Areas Act and should accordingly be afforded a similar rates status. Secondly, the exemption does not apply in respect of any portion of the protected area that is 'developed or used for commercial, business, agricultural or residential purposes'. It appears that this proviso has been included to cater for the exclusion of those portions of the protected area on which commercial lodges and the like have been established. In practice, however, a significant amount of development often precedes the establishment of a protected area.¹⁰¹ In addition, many institutions managing these protected areas undertake commercial enterprises in order to generate additional income to fund their conservation activities.¹⁰² Would this mean that this land would fall within the above proviso and be subject to rates? The boundaries of this proviso need to be far more precisely defined.

Thirdly, the Property Rates Act allows a municipality to apply to the Minister of Provincial and Local Government to be exempted from the above prohibition if it can demonstrate that it is 'compromising or impeding its ability to exercise its powers or perform its functions'.¹⁰³ This exemption only applies to land retained for conservation purposes and significantly reduces its status in the rating regime.¹⁰⁴ Given that conservation constitutes a significant public benefit, the application of this exemption, in respect of land falling within any type of protected area, should be removed. The Property Rates Act also allows municipalities to exempt certain categories of landowners from paying rates¹⁰⁵ and to grant

⁹⁹ Supra note 72, s 17(1)(e). This is a significant improvement on previous drafts of the Property Rates Act that only granted the above exemption in respect of state-owned land falling within a protected area.

¹⁰⁰ Section 17(2).

¹⁰¹ This development could include the construction of roads, water holes and the erection of perimeter fencing.

¹⁰² These activities could include erecting game lodges, undertaking commercial game hunting and running various eco-tourism activities such as game drives and nature trails.

¹⁰³ Section 18.

¹⁰⁴ The other prohibitions listed in s 17 in respect of which the s 18 exemption applies, generally relate to the valuation of property (such as the first 30 per cent of the market value of public service infrastructure and the first R 15 000 of the market value of property used for residential purposes) as opposed to the use of property per se.

¹⁰⁵ Section 15(1)(a).

other categories of landowners rebates or reductions.¹⁰⁶ These provisions do not, unfortunately, apply to land conserved in protected environments. As suggested above, these areas should either be exempted entirely, or should be subject to some form of rebate or reduction.

A final concern is that the Property Rates Act appears to give landowners a perverse incentive to develop previously undeveloped land for agricultural purposes.¹⁰⁷ This is due to the fact that agricultural use is afforded a very favourable rates status under the Property Rates Act.¹⁰⁸ Given the detrimental impact agriculture has had on South Africa's biodiversity, coupled with the public benefit of conserving biodiversity, it is suggested that land falling within all forms of protected area should be afforded a rating status at least equivalent to that of agriculture.

5.2 *Encouraging sustainable land-use practices on private land*

The declaration of protected areas alone will not ensure the conservation of South Africa's biodiversity, as a significant portion of valuable habitats, ecosystems, fauna and flora fall outside the boundaries of these areas. A key potential incentive to encourage private landowners to use their land in a sustainable manner is to grant them tax relief relating to the costs incurred in doing so, as well as the opportunity costs of not transforming natural areas of high conservation value. Mechanisms and safeguards need to be prescribed to identify which landowners should qualify for any applicable tax incentive and to ensure that any incentive scheme is not subject to abuse.

5.2.1 *Conservation mechanisms*

Prior to the introduction of the Biodiversity Act, Protected Areas Act and National Environmental Management Act, South Africa's conservation legislation made very limited provision for mechanisms of the above nature. However, these three laws provide various tools that could be used for this purpose.

Biodiversity Act

The Biodiversity Act radically reforms South Africa's biodiversity conservation legislation, with the government appointed as the trustee of the nation's biodiversity.¹⁰⁹ The Act prescribes a three-tier planning frame-

¹⁰⁶ Section 15(1)(b).

¹⁰⁷ 'Agricultural purposes' is defined to exclude the use of property '...for the purposes of eco-tourism or for the trading in or hunting of game' (s 1). Given the significant value which these activities indirectly contribute to biodiversity, and the beneficial treatment granted to the agricultural sector generally, this exclusion is disappointing and should be removed.

¹⁰⁸ First, one of the few listed categories in respect of which municipalities are entitled to grant exemptions, rebates and reductions, is land used for agricultural purposes (s 15(2)(f)). Secondly, in developing their rates policies, municipalities are obliged to consider the value agriculture contributes to the local economy (s 3(4)). No other land-use is afforded such specific recognition.

¹⁰⁹ Supra note 2, s 3.

work.¹¹⁰ First, the Minister of Environmental Affairs and Tourism is required to publish a national biodiversity framework.¹¹¹ Secondly, the Minister or relevant provincial MEC¹¹² may declare geographical regions as bioregions¹¹³ and publish bioregional plans for the management of the biodiversity in these regions.¹¹⁴ Thirdly, any person, organization or organ of state wishing to contribute to biodiversity management may submit a biodiversity management plan to the Minister for approval.¹¹⁵ The Minister must identify a suitable person, organization or organ of state responsible for implementing the plan,¹¹⁶ must assign responsibility to it for doing so,¹¹⁷ and may conclude a biodiversity management agreement to regulate the plan's practical implementation.¹¹⁸

These biodiversity management agreements provide a potential mechanism for identifying which conservation activities, undertaken on land situated outside of protected areas, should qualify for any applicable conservation incentive. It is suggested that any conservationist allowed by the Minister to implement a biodiversity management agreement should be entitled to various tax incentives, such as allowing expenses incurred in implementing the agreement to be deducted for income tax purposes. The tax incentive provisions will need to be prescribed in the Income Tax Act. The Biodiversity Act prescribes many safeguards that are aimed at ensuring that this mechanism cannot be used to secure the tax benefit for non-conservation activities.¹¹⁹

¹¹⁰ Chapter 3.

¹¹¹ The purpose of this framework is to provide an integrated, co-ordinated and uniform approach to biodiversity management by all spheres of government, communities, the private sector and the public; to identify priority areas for conservation and the establishment of protected areas; and to reflect regional co-operation on issues concerning biodiversity management in Southern Africa (s 39).

¹¹² The respective provincial MEC responsible for environmental affairs.

¹¹³ If that region contains whole or several nested ecosystems and is characterized by its landforms, vegetation cover, human culture and history (s 40(1)(a)).

¹¹⁴ Section 40(1). The bioregional plan must contain measures for the effective management of the biodiversity in the region, provide for monitoring of the plan and be consistent with the national biodiversity framework (s 41).

¹¹⁵ A biodiversity management plan must relate to certain ecosystems (listed in terms of s 51 or which is not listed but which does warrant special conservation attention (s 43(1)(a)) or indigenous species (listed in terms of s 55 or which is not listed but which does warrant special conservation attention (s 43(1)(b))). The biodiversity management plan must be aimed at ensuring the long-term survival in nature of the species or ecosystem to which the plan relates and must be consistent with the national biodiversity framework and any applicable bioregional plan (s 45). The Minister must review the plan at least every five years, assess compliance, and where necessary amend it, either at his own instance or at the request of an interested person, organization or organ of state (s 46).

¹¹⁶ Section 43(2).

¹¹⁷ Section 43(2)(c).

¹¹⁸ Section 44.

¹¹⁹ These safeguards include the following: biodiversity management plans can only be implemented in respect of specifically identified geographical areas and species, namely, threatened or protected ecosystems and species (s 43(1)); the Minister must approve the biodiversity management plan and agreement (ss 43(3) and 44 respectively); and the Minister must approve and appoint the persons, organizations or organs of state responsible for implementing these plans and agreements (ss 43(3) 44 respectively).

Protected Areas Act

The Protected Areas Act contains provisions that may be used to identify which conservation activities undertaken within protected areas should qualify for incentives. The Minister and provincial MECs are required to assign the management of a protected area to a management authority.¹²⁰ The management authority must prepare and submit a management plan for approval.¹²¹ The content of the management plan will effectively identify the conservation activities that must be undertaken by the management authority and, hence, which activities should qualify for any applicable conservation incentive.

It is proposed that management authorities should be allowed to deduct costs incurred in implementing a management plan for income tax purposes. The provision for these tax incentives will need to be prescribed in the Income Tax Act. Like the Biodiversity Act, the Protected Areas Act also provides sufficient safeguards to avert the potential abuse of this mechanism.¹²²

National Environmental Management Act

The National Environmental Management Act empowers the Minister of Environmental Affairs and Tourism, as well as every provincial MEC and municipality, to enter into environmental management co-operation agreements with any person or community for the purpose of promoting compliance with the national environmental management principles set out in the Act.¹²³ Certain of the principles specifically refer to biodiversity conservation¹²⁴ and these cooperation agreements therefore provide potential tools to identify conservation activities that could qualify for tax incentives.¹²⁵ It is suggested, however, that satisfactory mechanisms exist in South Africa's dedicated conservation legislation, such as the Protected Areas Act and the Biodiversity Act, and it would be preferable to use these

¹²⁰ Supra note 10, s 38.

¹²¹ Section 39.

¹²² These safeguards include the following: the right to enter into these agreements is reserved for the Minister, South African National Parks or the MECs (ss 18, 20, 23 and 28); these agreements may only be entered into in respect of land which is deemed suitable for inclusion in a protected area; the terms of the agreement must be recorded in a notarial deed and registered against the title deeds of the property (ss 35 and 36); the declaration may be withdrawn by the relevant authorities in certain circumstances (ss 19, 21, 24 and 29); the Minister or MEC must assign, in writing, the management of the private land to an approved management authority (s 38); the approved management authority must prepare a comprehensive management plan which prescribes the manner in which the private land must be managed (s 41); the Minister or MEC may prescribe performance indicators against which the management authority is required to monitor its performance and report annually (s 43); and the relevant authorities can cancel any managing authority's mandate to manage the private land in certain circumstances (s 44).

¹²³ Section 35 of the Act (supra note 64) prescribes the procedure and minimum content for these agreements.

¹²⁴ See s 4(a)(i) for example.

¹²⁵ This could be achieved by granting incentives to conservationists who enter into environmental management co-operation agreements aimed at conserving biodiversity, such as allowing them to deduct their costs in implementing the agreement for income tax purposes.

mechanisms for implementing incentive measures relating specifically to biodiversity conservation.

Property Rates Act

The Property Rates Act compels every municipality to adopt an annual rates policy and prescribes a list of factors that they must take into account when doing so.¹²⁶ These factors will ultimately determine the value of any property for rates purposes. A municipality is empowered to levy, in terms of the criteria set out in its rates policy, different rates for different categories of rateable property.¹²⁷ These criteria provide a potential mechanism through which a municipality could implement differential rating systems to encourage landowners to adopt sustainable land-use practices. This could be achieved, for example, by prescribing a favourable rating for those properties where landowners undertake sustainable land-use activities, like alien-invasive clearing. Alternatively, this could be achieved by including similar provisions in the national framework governing municipal rates policies that may be prescribed by the National Treasury in the future.¹²⁸

However, the Property Rates Act is not yet in operation and the factors that must currently be taken into account by a municipality in determining its rates policy do not include the potential for property rates to be used to achieve the above purpose. The inclusion of various conservation-related issues as factors that must be taken into account by any municipality when formulating its rating policy may create the legal framework within which municipalities can develop mechanisms and associated tax incentives, such as preferential rating systems, to reward those landowners who undertake conservation activities.¹²⁹ This approach would also provide the necessary flexibility to enable municipalities to introduce incentives that are appropriate within their given context.

5.2.2 *Tax incentives*

South Africa's tax legislation already contains various tax incentives aimed at encouraging private landowners to undertake sustainable land-use practices. Like existing conservation mechanisms, however, these incentives are limited and some potentially undermine biodiversity conservation. The ordinary rule in tax legislation is that only those expenses incurred directly in the production of income can be deducted for the purpose of determining one's annual taxable income. However, the Income Tax Act

¹²⁶ Supra note 72, s 3(3).

¹²⁷ Section 8.

¹²⁸ The Act provides for the adoption of a national framework with which all municipal rates policies must comply (s 3(5)).

¹²⁹ These issues could include the effect of rates on sustainable land-use and the biodiversity located within municipal boundaries and the need to include appropriate measures to promote and provide tax incentives for conservation and sustainable land-use practices.

allows certain persons to deduct expenses incurred in undertaking various conservation activities, irrespective of whether these are incurred in the generation of income.

Clearing alien invasive vegetation and preventing soil erosion

The Income Tax Act provides that any expenditure incurred by a person 'undertaking pastoral, agricultural or other farming operations' in the eradication of noxious plants¹³⁰ and the prevention of soil erosion, can be deducted for income tax purposes.¹³¹ This provides a significant tax benefit to farmers who undertake these conservation activities.

Alien and/or invasive vegetation poses a great threat to South Africa's biodiversity.¹³² An estimated eight per cent of land in South Africa has been invaded by alien invasive species and, at current rates of expansion, their impact could double in the next fifteen years.¹³³ This vegetation not only impacts on biodiversity, but currently consumes about 3.3 billion cubic metres of water annually, accounting for approximately seven per cent of the water that would otherwise flow in our rivers.¹³⁴ The government has identified the removal of this vegetation as a priority and established the Working for Water Programme to deal with the crisis. As of January 2004, government expenditure on this programme amounted to approximately R3.2 billion¹³⁵ and it is estimated that it will cost the government approximately R650 million per year for the next twenty years to bring alien invasive species under control.¹³⁶

Although legal obligations have been imposed on various landowners to clear alien invasive vegetation,¹³⁷ these measures may prove ineffective given that the cost of clearing activities often falls outside their budget, while enforcement often also proves to be difficult and costly. The above incentive potentially provides a valuable tool for the government to share these costs with private landowners. However, there are a number of limitations which could undermine its effectiveness.

First, it is only available to a limited range of persons, which excludes landowners who do not undertake agricultural activities, persons and organizations appointed to implement biodiversity management agreements

¹³⁰ The term 'noxious plants' is not defined but it is presumed to include alien and/or invasive plants.

¹³¹ Supra note 69, s 26 read with Schedule (1) para 12(1)(a) and (b).

¹³² Guy R Preston & W Roy Siegfried 'The protection of biological diversity in South Africa: Profiles and perceptions of professional practitioners in nature conservation agencies and natural history museums' (1995) 25 *South African Journal of Wildlife Research* 49.

¹³³ Wynberg op cit note 4 at 236–7.

¹³⁴ Ibid.

¹³⁵ Turpie op cit note 50 at 87.

¹³⁶ D C Le Maitre, BW van Wilgen, C M Gelderblom, C Bailey, R A Chapman & J A Nel 'Invasive alien trees and water resources in South Africa: Case studies of the costs and benefits of management' (2002) 160 *Forest Ecology and Management* 143.

¹³⁷ These requirements are currently prescribed in Regulations promulgated under the Conservation of Agricultural Resources Act (GN R1048 in GG 9238 of 25 May 1984 as amended). The Biodiversity Act supra note 2 also contains various provisions regulating alien and invasive species (Chap 5, Parts 1 & 2).

under the Biodiversity Act,¹³⁸ and management authorities appointed to manage protected areas under the Protected Areas Act.¹³⁹ This Act, too, potentially creates a perverse incentive for landowners to cultivate their land, which could be of high conservation value, in order to secure the tax benefit. Given that these conservation activities are often more advantageous to society than to individual landowners,¹⁴⁰ it is suggested that the Income Tax Act should be amended to allow all landowners, and the above conservation authorities, a similar tax deduction. This would remedy the current inequality and the untoward incentive that it creates. (As previously mentioned, the Biodiversity Act and Protected Areas Act contain numerous procedural safeguards to minimize the risk of the incentive being abused for tax avoidance purposes.)¹⁴¹

Secondly, the above tax incentive is restricted to a narrow range of conservation activities, namely the 'eradication of noxious plants' and the prevention of soil erosion. There are, however, many other equally valuable conservation activities undertaken by landowners, such as rehabilitating land previously subject to cultivation, that do not qualify for a similar tax deduction. It is suggested that this incentive should, as a minimum, be extended to cover expenses incurred in implementing a management plan approved under the Protected Areas Act and a biodiversity management agreement concluded under the Biodiversity Act.

Further incentives encouraging biodiversity depletion

The Income Tax Act currently allows farmers to deduct a range of expenses incurred in improving their agricultural infrastructure and increasing their agricultural yield.¹⁴² Given that one of the greatest threats to South Africa's current biodiversity is unrestricted agricultural and forestry expansion, allowing farmers to deduct their costs incurred in expanding production and infrastructure in these sectors has the potential to significantly undermine the conservation of South Africa's biodiversity. This incentive should be reappraised by the government to ensure that it does not unduly undermine South Africa's biodiversity.

Lessors undertaking soil erosion prevention works

The Income Tax Act also allows any person who lets land for pastoral, agricultural or other farming operations a tax deduction in respect of

¹³⁸ Supra note 2, s 44 provides for such appointment.

¹³⁹ Supra note 10, s 38 provides for such appointment.

¹⁴⁰ Turpie op cit note 50 at 91.

¹⁴¹ See notes 119 (regarding the Biodiversity Act) and 122 (regarding the Protected Areas Act).

¹⁴² These include: expenditure incurred in planting of trees, shrubs or perennial plants for the production of grapes or other fruit, nuts, tea, coffee, hops, sugar, vegetable oils or fibres, and the establishment of any area used for the planting of such trees, shrubs or plants (s 26 read with Schedule 1, para 12(1)(g)); expenditure incurred in building roads and bridges used in connection with farming operations (s 26 read with Schedule 1, para 12(1)(h)); and expenditure incurred in establishing plantations (s 26 read with Schedule 1, para 15(1)(a) and (b)).

expenditure incurred in the construction of soil erosion prevention works.¹⁴³ It is suggested that this benefit should similarly be extended to all lessors irrespective of whether the land is subject to cultivation. In addition, the range of conservation activities for which lessors can claim a deduction should be extended to cover other key conservation activities such as alien invasive clearing.

5.3 *Facilitating the formation of non-profit conservation organizations*

5.3.1 *Conservation mechanisms*

As has been previously highlighted in this article, non-profit conservation organizations can fulfil many valuable conservation functions and the government should create a statutory climate conducive to their formation and operation. There are currently three main laws in South Africa that regulate organizations of this nature: the Non-profit Organizations Act;¹⁴⁴ the Companies Act;¹⁴⁵ and the Income Tax Act, which provides limited tax incentives to organizations so formed.

Non-Profit Organizations Act and the Companies Act

The Non-profit Organizations Act establishes the administrative and regulatory framework within which non-profit organizations¹⁴⁶ conduct their affairs. There are two mandatory requirements for an entity to qualify as a non-profit organization.¹⁴⁷ First, it must be established for 'public purposes'¹⁴⁸ and secondly, its income and property may not be distributed to its members or office-bearers except as reasonable compensation for services rendered. The Act also prescribes detailed procedures for registration,¹⁴⁹ the preparation of accounting records and reports¹⁵⁰ and deregistration.¹⁵¹ The procedures are aimed at ensuring that these organizations do operate on a non-profit basis. Interestingly, the Act places a statutory duty on the government to implement policies and measures designed to promote, support and enhance the capacity of non-profit organizations to perform their functions.¹⁵²

The Companies Act, although primarily concerned with the regulation of commercial entities, also makes provision for a category of non-profit

¹⁴³ Section 17(A).

¹⁴⁴ Act 71 of 1997.

¹⁴⁵ Act 61 of 1973.

¹⁴⁶ Non-profit organizations can be trusts, companies or associations of persons. See the definition of 'non-profit organization' in s 1.

¹⁴⁷ Similarly, see the definition of 'non-profit organization' in s 1.

¹⁴⁸ The term 'public purpose' is not defined in the Act, but should include undertaking conservation activities given their public benefit nature.

¹⁴⁹ Sections 11–16.

¹⁵⁰ Sections 17 and 18.

¹⁵¹ Sections 21 and 23.

¹⁵² Section 3.

organization, namely 'associations not for gain', and prescribes a range of requirements regarding their formation.¹⁵³

These two laws appear to provide valuable mechanisms for conservation-ists to form conservation organizations, while prescribing the necessary safeguards to ensure that these organizations are not used as tax avoidance vehicles. However, the viability of these two mechanisms is somewhat undermined by the stringent provisions of the Income Tax Act regulating 'public benefit organizations' for the purposes of taxation.¹⁵⁴

Income Tax Act

In order to qualify as a 'public benefit organization' under the Income Tax Act, the organization must comply with a number of substantive and procedural requirements, certain of which are listed below. First, the organization must generally be incorporated as an association not for gain under the Companies Act and must register as a non-profit organization under the Non-profit Organizations Act.¹⁵⁵ Secondly, the organization's sole objective must be to carry on a 'public benefit activity', the definition of which includes various conservation activities.¹⁵⁶ Thirdly, the organization's activities must be carried on in a non-profit manner, may not promote the economic self-interest of any trustee or employee of the organization (other than by way of a reasonable salary) and 85 per cent of its activities must be carried out for the benefit of all South Africans.¹⁵⁷ Fourthly, all its activities must be carried on for the benefit of the general public; or be at least 85 per cent locally or foreign funded.¹⁵⁸ The Income Tax Act also prescribes detailed requirements regarding the nature of donations,¹⁵⁹ payment of excessive employee remuneration¹⁶⁰ and detailed reporting requirements.¹⁶¹ Finally, the organization cannot carry on any business or trading activity which generates a gross income which exceeds the greater of 15 per cent of the gross income of the organization or

¹⁵³ In order to qualify as an association not for gain, the company must generally: be formed for a legal purpose; have a main objective of promoting various cultural, social, communal or group interests (undertaking conservation activities in the public interest would appear to qualify); only use its profits or other income to achieve this objective; generally prohibit the payment of any income or dividend to its members, apart from reasonable compensation for services rendered to the association; and ensure that, on its closure, its assets are transferred to another association or organization with a similar objective (see s 21 generally).

¹⁵⁴ See s 30.

¹⁵⁵ *Supra* note 69, s 30(3)(g).

¹⁵⁶ 'Public benefit activity' is defined to include: engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere; the care of animals, including their rehabilitation, or prevention of their ill-treatment; and the establishment and management of a transfrontier conservation area (s 30(1)(b) read with the Ninth Schedule (Part I)(7)).

¹⁵⁷ Section 30(1)(b)(i), (ii) and (iii).

¹⁵⁸ Section 30(1)(c)(i), (ii) and (iii).

¹⁵⁹ Organizations are prohibited from accepting any donation which is recoverable at the instance of the donor for any reason other than a material failure of the organization to conform to the designated purpose and conditions of such a donation (s 30(3)(b)(v)).

¹⁶⁰ Organizations may not pay their employees excessive remuneration (s 30(3)(d)).

¹⁶¹ Organizations must comply with any reporting requirements prescribed by the Commissioner of Inland Revenue (s 30(3)(e)).

R25 000;¹⁶² is not directly related to the main object of the organization and would result in unfair competition in relation to other taxable organizations carrying on similar businesses or activities;¹⁶³ if not integral and directly related to the sole object of the organization, is not of an occasional nature;¹⁶⁴ or is not approved by the Minister.¹⁶⁵

Although the majority of these stringent requirements are necessary to prevent people from using public benefit organizations as tax avoidance vehicles, the requirements limiting the capacity of these organizations to undertake income-generating activities for the sole purpose of funding their public benefit activities jeopardize the viability of a number of conservation organizations and potentially discourage the formation of others.¹⁶⁶ With the decrease in the availability of foreign and local funding, many conservation organizations are compelled to undertake ancillary income-generating activities for the sole purpose of funding their public benefit activities. These institutions are frequently disqualified from being regarded as public benefit organizations as a result of these income-generating activities and denied crucial tax benefits.¹⁶⁷

5.3.2 *Tax incentives*

A number of organizations are exempted from paying tax under the Income Tax Act on income received from various sources.¹⁶⁸ These sources could include donations, interest earned on their investments and income derived from their services. This creates an incentive for people to form the following organizations in order to secure this tax exemption.

Institutions under s 10(1)(cA)

The first of these exemptions is granted to any institution, board or body¹⁶⁹ established for the sole or principal object of: conducting scientific, technical or industrial research; providing necessary or useful commodities, amenities or services to the state; or carrying on activities designed to promote commerce, industry or agriculture. In order to qualify for this exemption, a conservation organization must also comply with various additional requirements relating to the distribution of its profits, the use of its funds and dissolution,¹⁷⁰ and must have Commissioner of Inland Revenue approval.¹⁷¹

¹⁶² Section 30(3)(b)(iv)(aa).

¹⁶³ Section 30(3)(b)(iv)(bb).

¹⁶⁴ Section 30(3)(b)(iv)(cc).

¹⁶⁵ Section 30(3)(b)(iv)(dd).

¹⁶⁶ These requirements include, particularly, those set out in ss 30(1)(c)(iii) and 30(3)(b)(iv).

¹⁶⁷ This problem is discussed in more detail below in relation to the tax benefits currently available to these public benefit organizations.

¹⁶⁸ Section 10.

¹⁶⁹ Other than a company, closed corporation or trust.

¹⁷⁰ Section 10(1)(cA)(b).

¹⁷¹ Section 10(1)(cA)(a).

Conservation organizations may well fall within the first two sub-categories of institutions. However, the third sub-category effectively excludes conservation organizations and therefore subjects them to an undue disadvantage. Organizations promoting conservation are surely of equal importance to those promoting commerce, industry or agriculture and should, therefore, be accorded a similar tax status. Their exclusion may discourage conservationists from forming organizations to carry out conservation activities. It may also undermine the viability of current organizations that, but for the fact that they seek to promote conservation as opposed to agriculture, do not qualify for this tax exemption.

It is suggested that any organization established with the principal object of undertaking activities designed to promote conservation should similarly be exempted from paying tax on its income.¹⁷²

Institutions under s 10(1)(cH)

These institutions include any company, society, association, or trust established with the sole objective of complying with the legal obligations imposed on mining operations to rehabilitate disturbances of the surface of the land, prevent pollution and protect the surface of the land and water resources.¹⁷³ These organizations must also be approved by the Commissioner of Inland Revenue prior to qualifying for this exemption.

Although providing an important incentive for the formation of these organizations in the mining sector, it is suggested that it would be both equitable and advantageous to extend its application to statutory obligations imposed by environmental legislation in other contexts.¹⁷⁴

Institutions under s 10(1)(cN)

Public benefit organizations that have been approved by the Commissioner of Inland Revenue in terms of s 30(3) of the Income Tax Act are similarly exempt from income tax. As is mentioned above, the need to prescribe strict eligibility criteria for public benefit organizations to ensure that they are not abused as tax avoidance vehicles is understood. However, the current restrictions imposed on these organizations with regard to

¹⁷² This could be achieved by simply extending the range of institutions that are exempted in terms of s 10(1)(cA)(cc) to include those that carry on conservation activities. Alternatively, an additional category of organizations that carry on conservation activities, could be inserted into s 10. Interestingly, s 10(1)(cB)(cc) of the Income Tax Act, repealed by Act 30 of 2000, previously exempted any company, society or other association of persons from taxation if its sole or principal object was 'to engage in or promote nature conservation or animal protection activities'. This exemption could be reinstated in the Income Tax Act.

¹⁷³ These obligations are principally imposed in terms of the Minerals and Petroleum Resources Development Act 28 of 2002. See ss 37–44 in particular.

¹⁷⁴ These measures could include, for example, those taken by individuals or organizations to ensure compliance with the duty of care provisions imposed by s 28 of the National Environmental Management Act supra note 64 and s 19 of the National Water Act supra note 64, or with their obligations to control alien invasive vegetation prescribed in regulations promulgated under the Conservation of Agricultural Resources Act supra note 64.

income-generating activities potentially undermine the viability of many current conservation organizations and discourages the formation of others.

In particular, the limitations placed on the amount these organizations may raise through income-generating activities need to be significantly relaxed or removed. It would appear that, as long as the income is generated and used for the sole purpose of funding the public benefit activities of the organization, the rationale behind the current threshold will fall away. In addition, given the myriad of other requirements imposed on these organizations, an amendment of this nature would not unduly increase the risk of these organizations being abused for tax avoidance purposes.

5.4 *Supporting current conservation initiatives*

Conservationists can play a further key role in biodiversity conservation through supporting current conservation initiatives. Although current tax legislation provides various incentives aimed at encouraging donations to various conservation initiatives, there are a number of problems which limit their effectiveness.

5.4.1 *Income Tax Act*

Donations to transfrontier conservation areas are tax deductible

Donations account for a significant portion of the resources necessary to operate conservation organizations. The Income Tax Act allows any donation, made in cash or kind to certain organizations¹⁷⁵ involved in the establishment or management of transfrontier conservation areas, to be tax deductible.¹⁷⁶ The value of the allowable deduction is limited to the greater of five per cent of the donor's taxable income or R1000,¹⁷⁷ unless the Commissioner of Inland Revenue specifically allows a greater amount.¹⁷⁸ There are, however, many problems which limit the effectiveness of this incentive.

First, placing significant limitations on the quantum of the allowable deduction may discourage potential donors from making sizeable donations. Secondly, it effectively precludes conservationists from donating land, the value of which will exceed the prescribed quantum in most cases. Thirdly, although the Commissioner of Inland Revenue has discretion to

¹⁷⁵ The organizations include 'public benefit organizations' approved in terms of s 30 and institutions listed in s 10(cA).

¹⁷⁶ Section 18A(1)(a) read together with s 30 and the Ninth Schedule (Part II(4)).

¹⁷⁷ Section 18A(1)(aa) and (bb).

¹⁷⁸ Section 18A(i) empowers the Commissioner of Inland Revenue, on good cause shown and subject to any conditions as he or she may determine to allow a person to deduct a greater sum donated to an organization establishing or managing a transfrontier conservation area taking into account the public interest and the purpose for which the relevant organization wishes to accumulate funds.

allow greater donations to be deductible, the onerous administrative procedure to obtain the requisite permission may well discourage potential donors.

It is therefore suggested that the value of the allowable deduction should be significantly increased. Given that the organizations receiving these donations constitute public benefit organizations and are hence subject to all the safeguards prescribed by the Income Tax Act, it would not unduly increase the risk of these donations being used for tax avoidance purposes.

Secondly, donations are only deductible if they are made to transfrontier conservation areas.¹⁷⁹ There are currently only four of these areas.¹⁸⁰ This limitation deprives many other conservation areas, agencies and organizations from a vital funding source despite the fact that they perform activities of equal or greater conservation importance and are similarly dependent on donations for their survival. Extending the application of the above deduction to all public benefit organizations involved in biodiversity conservation would be far more equitable, and would potentially increase donations of this nature.

Thirdly, the deduction is limited to donations in cash or kind. Many landowners currently contract their private land into protected areas by way of written agreement.¹⁸¹ In terms of these agreements, the landowner generally retains ownership of the land but grants rights to the conservation organization. In addition, the conservation agreement frequently restricts the landowner's activities and development rights in the area subject to the agreement. The donation of rights over the land in terms of the conservation agreement therefore has value and should, it is argued, also be regarded as a donation.

Despite the above, no provision is currently made for private landowners to deduct the value of the donation for income-tax purposes. Given that these agreements appear to provide a very cost-effective means of increasing the area of land incorporated within protected areas, it is suggested that the government should offer landowners tax incentives to enter into them. This could be achieved by amending the Income Tax Act to allow for the value of donations of private land to special nature reserves, national parks or nature reserves, by way of contracting the land for incorporation under the Protected Areas Act, to be tax deductible. As has been previously stated in

¹⁷⁹ This is because s 18(A)(1)(a)(aa) limits the range of organizations to which these donations can be made. The organizations, whether a public benefit organization approved in terms of s 30, or an institution contemplated in s 10(1)(cA)(i) must be undertaking public benefit activities listed in Part II of the Ninth Schedule. Part II only lists the establishment and management of transfrontier areas (Item 4) and not the full range of conservation activities listed in Part I of the Ninth Schedule.

¹⁸⁰ These are the Kgalagadi Transfrontier Park, Ai-Ais Richtersveld Transfrontier Conservation Park, Gaza-Kruger-Gonarezho Transfrontier Park and Maloti-Drakensberg Transfrontier Conservation and Development Project.

¹⁸¹ As previously discussed in this article, this is currently provided for in legislation including the National Parks Act *supra* note 64 and various Provincial conservation ordinances and acts. The Protected Areas Act *supra* note 64 makes similar provision for the Minister or MEC to contract private land into protected areas.

this article, there are numerous safeguards contained in the Protected Areas Act to prevent this incentive from being abused.¹⁸²

An important issue that the government would need to resolve is how to value agreements of this nature. There appear to be three potential values which the authorities could utilize, namely: the deemed loss in value of the land over which the agreement has been registered, as ascertained by a valuation issued by a certified authority; a prescribed percentage loss of between ten and thirty per cent; or the average of three land valuations undertaken by accredited valuers.¹⁸³

Donations to various organizations exempted from donations tax

Subject to certain exceptions, people who donate cash or property to another person are generally required to pay a donations tax of 20 per cent of the value of the donation.¹⁸⁴ Donors to certain organizations¹⁸⁵ are, however, exempted from paying donations tax.¹⁸⁶ Unlike the above exemption, no limitation is placed on the value of these donations. Therefore, if a person makes a donation to a conservation organization that qualifies as one of these institutions, the person will be exempted from paying donations tax on the donation. The conservation organization will similarly be exempted from paying income tax on the donation.

However, the strict eligibility criteria for qualifying as a public benefit organization, discussed above, appear to undermine this incentive. Many conservation organizations will not qualify as organizations to which donations are exempted due to these stringent requirements. The taxpayer will be liable to pay donations tax on the donation, thereby undermining any incentive for him or her to make the donation and depriving the conservation organization of an essential income source.

Donations of R30 000 and less exempted from donations tax

The Income Tax Act also provides that natural persons and companies are exempt from paying donations tax on donations to the value of R30 000 and R10 000 per annum respectively. This exemption applies irrespective of the identity of the person or organization to which the donation is made. Therefore, if the donation is made to a conservation organization the donor will not have to pay donations tax on it irrespective of whether or not it qualifies as a public benefit organization.

However, the potential of this incentive in respect of biodiversity conservation is similarly undermined by the limitations placed on the

¹⁸² See op cit note 122 (dealing with the Protected Areas Act supra note 10) regarding these safeguards.

¹⁸³ See generally Stockford (op cit note 31 at 823–53) regarding the approaches adopted in the United States to value conservation servitudes within this context.

¹⁸⁴ Section 54 read with s 64 of the Income Tax Act.

¹⁸⁵ These institutions are: those listed in s 10(1)(cA) cA); those listed in s 10(1)(cH); and public benefit organizations registered in terms of s 10(1)(cN).

¹⁸⁶ Section 56(1)(h) read with s 10(1)(cA), (cH) and (cN).

quantum of the allowable deduction. These thresholds similarly preclude the private sector from donating land to conservation organizations. In addition, they deprive conservation organizations of a necessary resource base as the private sector has little incentive to make large donations given that these will be subject to donations tax. Significantly increasing these thresholds in respect of donations to management authorities appointed under the Protected Areas Act and organizations appointed to implement biodiversity management plans under the Biodiversity Act in particular, would partially overcome these problems, whilst similarly minimizing the potential abuse of this incentive for tax avoidance purposes.

5.4.2 *Transfer Duty Act*

Any person acquiring 'property'¹⁸⁷ must pay transfer duty calculated according to the value of the property transferred.¹⁸⁸ Transfer duty is payable on the sale or donation of land to another person. Certain organizations are, however, exempt from paying transfer duty on property acquired by them, the whole, or substantially the whole, of which will be used for the purposes of the public benefit activity undertaken by the organization.¹⁸⁹

This provides an important incentive to conservation organizations to acquire property for conservation purposes which they might otherwise have been unable to acquire due to the high transfer duty associated with the transactions. However, the limitations imposed on the range of organizations that may qualify for the exemption once again appear to undermine this incentive if one considers the following.

The future management of South Africa's protected areas will be assigned to various management authorities under the Protected Areas Act.¹⁹⁰ These management authorities will frequently seek to acquire land to extend the boundaries of their respective protected areas but will not qualify for this exemption given the strict eligibility criteria for 'public benefit organizations' prescribed by the Income Tax Act. It is therefore suggested that, in addition to relaxing the qualification criteria for 'public benefit organizations', this incentive should also be available to management authorities seeking to purchase land of high conservation value for inclusion in a protected area, irrespective of whether or not they are registered as public benefit organizations under the Income Tax Act. As previously discussed in

¹⁸⁷ 'Property' is defined to include any real right in land, certain leases and any mineral right (s 1).

¹⁸⁸ Transfer Duty Act supra note 70, s 2.

¹⁸⁹ These organizations include: public benefit organizations approved in terms of s 30(3) of the Income Tax Act supra note 69 (s 9(c)(i)); and any institution, board or body exempt from tax in terms of s 10(1)(cA)(i) of the Income Tax Act, which has as its sole or principal object the carrying on of any public benefit activity contemplated in s 30 of that act (s 9(c)(ii)).

¹⁹⁰ In terms of the Protected Areas Act supra note 10, the Minister or Provincial MEC can appoint any suitable person, organization or organ of state as a management authority (s 38).

this article, there appear to be sufficient safeguards in the Protected Areas Act to prevent the abuse of this incentive.¹⁹¹

5.4.3 *Estate Duty Act*

The government charges a duty on the value of the estate¹⁹² of anyone who dies in South Africa.¹⁹³ The amount of estate duty is calculated according to various tables annexed to the Estate Duty Act with the first R1.5m of the deceased's estate being exempted.¹⁹⁴

Estate duty is generally based on the fair market value of property in the estate. In many cases, the tax burden imposed by taxing land at the fair market value forces heirs to sell the land in order to pay the estate duty, particularly if the family is rich in land, but poor in cash. This has potentially devastating results where the estate comprises land of high conservation value.

Fortunately, the Estate Duty Act allows various deductions in determining the value of someone's estate for estate duty purposes. Of specific interest to conservation is the deduction allowed in respect of the value of any property left to the same range of organizations as those listed above in relation to the Transfer Duty Act.¹⁹⁵ This grants testators a potentially significant incentive to bequeath land or money to these organizations. Unlike donations made during the lifetime of the deceased, no limitation is placed on the value of any testamentary donations.

However, the strict eligibility criteria for 'public benefit organizations' prescribed by the Income Tax Act may similarly undermine this potential conservation incentive and should be reconsidered. In addition, the limitations imposed on the range of organizations to which property may be donated may effectively undermine this incentive. Management authorities appointed to undertake the future management of protected areas under the Protected Areas Act will often not qualify as public benefit organizations. It is therefore suggested that this incentive should also be extended to landowners who wish to bequeath land or money to these management authorities, irrespective of whether or not the management authority is registered as a public benefit organization under the Income Tax Act.

A further important provision contained in the Estate Duty Act is that which sets out how to determine the value of a person's property for estate duty purposes.¹⁹⁶ The Act prescribes that, where the deceased owned land subject to a usufructory or other 'like interest' in favour of any person, the

¹⁹¹ See note 122 (dealing with the Protected Areas Act) regarding these safeguards.

¹⁹² Estate Duty Act *supra* note 71. The estate of any person consists of all the property that was owned by that person at the date of his or her death (s 3).

¹⁹³ Section 2.

¹⁹⁴ Section 4(A).

¹⁹⁵ Section 4(h)(i). This section specifically refers to public benefit organizations exempted from tax in terms of s 10(1)(cN) of the Income Tax Act *supra* note 69. Section 10(1)(cN) refers to organization approved in terms of s 30(3) of the Income Tax Act.

¹⁹⁶ Section 5.

value of the property for estate duty purposes will be deemed to be the amount by which the fair market value of the property exceeds the value of the above interest.¹⁹⁷ The act prescribes a complicated formula for calculating the value of the interest.¹⁹⁸

This provision may be of great significance in those situations where a private landowner has, during his or her lifetime, contracted his or her land into a special nature reserve, national park or nature reserve under the Protected Areas Act. I would argue that these conservation agreements should be deemed to fall within the ambit of the above provision, as they are similar in nature to a usufruct and the value of the deceased's estate should, therefore, be reduced according to the value of the 'donation'. This potentially provides an important incentive to private landowners to contract their land to protected areas. In the event that this provision is not deemed to cover these conservation agreements, it is suggested that the Act should be amended to provide for their inclusion.

6 CONCLUSION

The traditional regulatory measures and institutional structures prescribed by South Africa's conservation legislation have largely failed to provide an effective framework to ensure the long-term conservation of South Africa's biodiversity. Increasing private sector investment in biodiversity conservation, through the range of conservation mechanisms and associated tax incentives suggested in this article, present tools to overcome these challenges. These tools have proven successful in many foreign jurisdictions and appear to provide practical solutions to the problems posed by South Africa's current conservation realities: in particular, by the limited resources the government has to spend on biodiversity conservation, coupled with extensive private landownership.

Although South Africa's current tax and conservation legislation has gone some way towards implementing various conservation mechanisms and tax incentives, a number of amendments need to be made to align South Africa's tax legislation with the various conservation mechanisms prescribed in the Protected Areas Act and Biodiversity Act. Without this alignment, there is no direct encouragement for conservationists to use these mechanisms and become active participants in biodiversity conservation.

The conservation mechanisms and tax incentives highlighted in this article are in line with numerous South African policy documents and conventions to which South Africa is a party, and could significantly assist the government in fulfilling its constitutional mandate to prevent ecological degradation, promote conservation and secure ecologically sustainable development. Opponents of tax incentives will no doubt argue that the incentives proposed in this article may lead to a significant reduction in the

¹⁹⁷ Section 5(f).

¹⁹⁸ Section 5(f)(iii).

overall tax revenue. However, limiting their availability and prescribing procedural and substantive safeguards could ultimately prove to be more cost effective than implementing the current command-and-control approach.

The need for inter-departmental consultation to consider and quantify the costs and benefits of introducing these tax incentives is clear. However, as one commentator suggested almost ten years ago, given the extent of the demise of South Africa's biodiversity, it may be preferable to implement conservation incentives on the basis of estimations rather than delay implementation to obtain absolute certainty through costly and time-consuming cost-benefit analyses.¹⁹⁹

To continue to ignore the potential benefits these tools offer the government, conservation organizations, private landowners and communities in the sphere of biodiversity conservation makes little sense from an economic or conservation perspective.

¹⁹⁹ Paul G Henderson 'Fiscal incentives for environmental protection – The way forward' (1995) 2 *South African Journal of Environmental Law and Policy* 151 at 152.